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IN THE

Supreme Court of the United States

October Term 1978

No. 78-778

NATTER MANUFACTURING CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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NATTER MANUFACTURING CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Natter Manufacturing Corporation, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit and its judgment, which was entered in this case on September 27, 1978.

Opinions Below.

The opinion of the Court of Appeals is reported at 580 F.2d 948 and is reproduced herein as Appendix A. The decisions of the National Labor Relations Board, which were enforced by the Court of Appeals, are reported at 210 N.L.R.B. 118 (1974) and at 221 N.L.R.B. 13 (1975) and are reproduced herein as Appendices B and C, respectively.

Jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

Whether the National Labor Relations Board has the duty under the Fifth Amendment to the United States Constitution to withhold certification pursuant to Section 9(c) of the National Labor Relations Act from a union which discriminates unlawfully on the basis of race or sex.

Whether the National Labor Relations Board must hold a hearing prior to certifying a union as the exclusive bargaining representative of a group of employees to determine whether or not the union unlawfully discriminates on the basis of race or sex.

Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to refuse to meet and bargain with a union which practices unlawful discrimination on the basis of race or sex.

Statute Involved.

The relevant statutory provisions, 29 U.S.C. §§ 158 (a)(1) and (5), are set forth in Appendix D hereto.

Statement.

Natter Manufacturing Corporation (hereinafter referred to as "Natter" or "Petitioner") is in the business of manufacturing and selling fabricated metal products. It operates two facilities in Temple City, California, another in Arcadia, California, and a fourth in La Verne, California.

On September 11, 1972, the Sheet Metal Workers' International Association, Local Union No. 170, AFL-CIO (hereinafter referred to as "Union"), filed a representation petition seeking to be certified as the collective bargaining agent of all Natter's employees except those who are specifically excluded by the National Labor Relations Act (hereinafter referred to as "NLRA" or "Act"). A hearing was held on this petition on October 13, 1972. Although Natter vigorously and repeatedly sought to inquire into the Union's discriminatory membership policies, the Hearing Officer refused to admit evidence on this issue.

On March 29, 1973, the Regional Director permitted the Union to withdraw its representation petition. Another petition was filed by the Union on April 20, 1973, to represent substantially the same unit of employees. By a motion filed on May 4, 1973, Natter sought permission to inquire into the Union's discriminatory membership practices and policies in the representation hearing scheduled for May 23, 1973. On May 13, 1973, the National Labor Relations Board (hereinafter referred to as "NLRB" or "Board") issued an order denying this request "without prejudice to the employer's right to raise the issue of disqualification of the petitioner by motion within five days of the tally of ballots. . . ."

On July 13, 1973, an election was held in which 151 votes were cast against the Union and 150 were cast for the Union. However, the results of this election were ultimately set aside by the Board in 210 N.L.R.B. 118 on the ground of an alleged misrepresentation by Natter during the pre-election period. A second election was held on May 23, 1974. Two hundred and three (203) votes were cast for the Union, 198 votes were cast against the Union, and three ballots were challenged.

On May 30, 1974, Natter filed a "Motion to Disqualify Petitioner From Receiving National Labor Relations Board Certification" and requested a hearing on this motion. The basis for the motion was Natter's allegation that the Union engaged in discriminatory practices and policies. The Regional Director summarily denied the motion on August 9, 1974, with merely an *ex parte* administrative investigation and without benefit of a hearing. Natter filed with the NLRB on August 16, 1974, a "Request for Review," but this request was denied by the Board on October 2, 1974. Again, no hearing was conducted.

On October 16, 1974, Natter rejected the Union's request to commence bargaining on the ground that the Union was improperly certified. The Union filed an unfair labor practice charge with the Board on October 29, 1974, claiming that Natter was violating Sections 8(a)(5) and (1) of the Act by refusing to bargain. On November 22, 1974, a Complaint issued, and an unfair labor practice hearing was thereafter scheduled for December 17, 1974. On December 3, 1974, Petitioner filed its Answer to this Complaint, alleging as one of its affirmative defenses that the Union was improperly certified because of its discriminatory practices and policies. On December 11, 1974, the Regional Director postponed the scheduled hearing indefinitely.

On December 17, 1974, the General Counsel filed a Motion for Summary Judgment in which it asserted that the issues raised by Natter in its Answer had already been adjudicated by the Board in the representation proceeding. It argued, accordingly, that no hearing was needed to decide these issues. On April 2, 1975,

the NLRB issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted.

The Board granted General Counsel's Motion for Summary Judgment on October 23, 1975, in *Natter Manufacturing Corporation,* 221 N.L.R.B. 13, again without a hearing on the discrimination claims. The basis for this order was that the discrimination issue had already been disposed of in the representation case proceedings and that further consideration in the unfair labor practice hearing would constitute relitigation of the question. The Board, therefore, found that Natter was guilty of violating Sections 8(a)(5) and (1) of the Act and ordered it to bargain with the Union upon request.

On December 15, 1975, Natter petitioned the Ninth Circuit Court of Appeals to review and set aside the Board's order. Natter argued, *inter alia,* that the Board is constitutionally precluded from granting certification to a union which engages in discriminatory conduct and that it should have been granted a hearing to adjudicate this allegation prior to certification of the Union. Further, Natter contended that under the NLRB's regulations, its claim of Union discrimination in its "Motion to Disqualify" raised "substantial and material factual issues" which warranted determination in a post-election hearing.

On September 27, 1978, judgment was entered against the Petitioner. The court concluded in its opinion that Natter would not be entitled to inquire into the Union's discriminatory practices and policies without deciding the constitutional claims. The court reasoned that Natter should have presented affidavits of dis-

criminatees to the NLRB as a precondition to obtaining a hearing rather than relying upon evidence that the International Union, of which Local 170 is a member, discriminates on the basis of race. In this vein, the court completely dismissed Petitioner's showing that the International controls its locals through powers expressly conferred by its constitution, finding that greater proof of domination was required before a hearing would be mandated under Board rules.

REASONS FOR GRANTING THE WRIT.

I.

The National Labor Relations Board Is Constitutionally Prohibited From Assisting a Private Labor Union Which Engages in Racial or Sex Discrimination.

Federal labor legislation, which is given effect by a federal administrative agency, cannot constitutionally legitimize the power which a discriminatory union can exercise over minority workers. The doctrine of "governmental action" holds that government enforcement, ratification or support of racial discrimination, as well as substantial involvement therein, converts would-be private discrimination into that of the government. Thus, in *Shelley v. Kraemer,* 334 U.S. 1 (1948), state enforcement of private racially restrictive realty covenants was deemed to be proscribed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Similarly, in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the fact that a private restaurant was operated as an integral part of a public building devoted to a public parking service was seen as creating sufficient "mutual benefit" to invoke the Equal Protection Clause against the restaurant operator. As this Court stated in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974), "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." The mere licensing of a private enterprise, of course, does not foster or encourage discrimination practiced by that enterprise and there is no violation of the Equal Protection Clause

if the private entity receives *any* sort of benefit at all from the government—such as police or fire protection. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173 (1972). However, where the government is "significantly involved itself with invidious discriminations," *Reitman v. Mulkey,* 387 U.S. 369, 380 (1967), or does more than simply act as a passive "overseer" to become a "partner" to the action complained of, *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 117-19 (1973), requisite governmental action exists to invoke constitutional limitations. *See also Public Utilities Commission of District of Columbia v. Pollak,* 343 U.S. 451 (1952) (where transit system operated under the supervision of a regulatory agency authorized by Congress, and this system received express sanction to conduct business after a regulatory inquiry, government action was found).

The government action limitations are equally binding on the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Schneider v. Rusk,* 377 U.S. 163 (1964). Accordingly, when the National Labor Relations Board renders assistance to a discriminatory labor union by placing it in a position of power from which it can abuse the rights of black workers or members of other minority groups, constitutional restrictions arise.

The process of certifying a union as the exclusive bargaining agent under Section 9(c) of the Act involves much more than merely the impartial or passive administration of a legislative scheme.[1] Certification be-

[1]Section 9(c) of the NLRA requires the NLRB to direct an election when a question of representation exists, and states in mandatory terms that it "shall certify the results thereof."

stows significant advantages upon the union and involves the active intervention of the Board by placing the mechanism of the NLRB at the union's disposal. These protections include the right to be the exclusive bargaining representative of the employees in the bargaining unit, the right to be free from the threat of rival unions engaging in recognitional picketing in violation of Section 8(b)(4)(C) of the Act, the ability to compel an employer to bargain about terms and conditions of employment under Section 8(a)(5), the ability to remain secure from decertification proceedings for twelve months from the date of certification, and the ability to be free from rival election petitions for twelve months following certification. *See* Note, *Employment Discrimination—N.L.R.B. Certification of Discriminatory Unions as Governmental Action,* 50 WASH. L. REV. 1023, 1034 (1975). Thus, the Eighth Circuit Court of Appeals in *N.L.R.B. v. Mansion House Center Management Corp.,* 473 F.2d 471 (1973) concluded that the NLRB's certification of unions which discriminate on the basis of race constitutes sufficient federal participation in the activity to violate the Constitution:

> "Collective bargaining is the fulcrum of successful labor-management relations throughout the country. Our national labor policy views union membership as a necessary good to most all working men. When a union discriminates on the basis of race or color it invidiously deprives equal opportunity for employment to a large segment of working men. See Sovern, The National Labor Relations Act and Racial Discrimination, 62

Colum. L. Rev. 563 (1962). When a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices. Although the union itself is not a governmental instrumentality the National Labor Relations Board is. N.L.R.B. v. Nash-Finch Co., 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971). Moreover, here the Board seeks judicial enforcement of its order requiring collective bargaining in a federal court. Obviously, judicial enforcement of private discrimination cannot be sanctioned. Cf. Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); Hurd v. Hodge, 334 U.S. 24, 68. S.Ct. 847, 92 L.Ed. 1187 (1948); Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

* * *

> "In substance we hold the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination. Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets." *Id.*, at 473-74, 477.

The extent to which a union discriminates against minority workers, therefore, received the court's approbation as a "relevant area of inquiry" when raised as

a defense to a charge of an unlawful refusal to bargain with the certified bargaining representative.[2]

In the wake of *Mansion House,* the NLRB adopted a policy of withholding certification from unions defaulting on their duty to represent members of the bargaining unit equally. It announced this position in a press release in June, 1974, entitled "N.L.R.B. Sets Procedures in Discrimination Claims Cases Involving Union," N.L.R.B. Press Release (June 11, 1974). In *Bekins Moving & Storage Co.,* 211 N.L.R.B. 138 (1974), the position was officially embraced in a Board decision after the employer alleged that the union was ineligible for a certification election because it discriminated on the basis of sex and national origin. The plurality of the Board expressly stated that the NLRB will consider the merits of such an objection prior to issuance of certification since it cannot "constitutionally certify a union which is shown to have a propensity to fail fairly to represent employees." 211 N.L.R.B. at 139. This remedy supplemented the Board's earlier policy of *rescinding* certification of a union as collective bargaining agent where segregated locals are set up or where contracts are executed or administered in a manner which perpetuates racial discrimination in employment. *Independent Metal Workers Union, Local No. 1,* 147 N.L.R.B. 1573 (1964). *Cf. Pioneer Bus Co.,* 140 N.L.R.B. 54 (1962). (The "contract bar" rule will not be applied where a union violates its duty of fair representation.) Nonetheless, in *Handy Andy, Inc.,* 228 N.L.R.B. 447 (1977), the Board departed from this stance, stating that certifica-

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[2]The court remanded the case to the NLRB for reconsideration in accord with its decision. However, the Board subsequently dropped the unfair labor charges against the employer.

tion does not constitute "government action" restricted by the Fifth Amendment and that an unfair labor practice hearing is the "appropriate vehicle" for resolving whether a certified union violates its duty of fair representation.

Several commentators are in agreement with the view, however, that it is destructive of employee rights to allow a discriminatory union to serve as the certified bargaining agent. For example, Herbert Hill has criticized the NLRB's refusal to act in the face of concrete statistical evidence of racial discrimination, especially in light of the purposes embodied in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.* (1970):

> "It is doubtful that the N.L.R.B. has grasped the full significance of the concept of the duty of fair representation as generated by cases brought under Title VII of the Civil Rights Act of 1964, and cerrainly [sic] it has not begun to understand the remedies required in cases of that character. The right to be the exclusive collective bargaining agent flows from a statute. The exclusive character of the bargaining relationship in turn generates the duty to represent all workers fairly. It seems quite sound to argue that where there is a failure of fair representation, the right to be the exclusive representative must be revoked." Hill, *The National Labor Relations Act and the Emergence of Civil Rights Law: A New Priority In Federal Labor Policy*, 11 Harv. Civ. Rights—Civ. Lib. L. Rev. 299, 360 (1976).

Also see Herring, *The Fair Representation Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113, 161-62 (1964); Rosen,

The Law and Racial Discrimination in Employment, 53 CALIF. L. REV. 729, 790-91 (1965); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962). *Cf.* Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies The Better?*, 42 U. CHI. L. REV. 1 (1974).

The Ninth Circuit Court of Appeals in *Plastiline, Inc. v. Johansen*, reported unofficially at 88 L.R.R.M. 3183 (1975), also recognized that at some point, the NLRB must determine whether charges of discrimination render a union ineligible as the employees' collective bargaining representative:

> "[T]he labor board must consider the charges of an employer that a certain union practices invidious sex and racial discrimination, and, if sustained, the employer need not bargain with the union."

Given that proof of union discrimination deprives the NLRB of authority to certify it as the collective bargaining agent of Petitioner's employees, it is axiomatic that Petitioner must be given a fair and adequate opportunity to prove that the union in this case discriminates. The Petitioner, both before and after the May 23, 1973, election requested a hearing to demonstrate that the Sheet Metal Workers' International Association, to whose policies the local in this case is bound, favors white employees to the detriment of minority members and is unfit as a collective bargaining representative of all the employees. Despite concrete proof derived from multiple judicial opinions that the Sheet Metal Workers has been found guilty of racial discrimination, and allegations by the Petitioner of a

close nexus between policies at the International level and policies at the local level, at no stage in the proceedings was the Petitioner granted an evidentiary hearing to prove these facts. The Petitioner's right to a hearing, therefore, is a procedural question of controlling importance, for absent this opportunity, the employees' right not to be unfairly represented by an improperly certified union is wholly vitiated. Thus, the Petitioner cannot be found to have refused to bargain in violation of Section 8(a)(5) of the Act when it failed to meet and to negotiate with a union which practices sex or racial discrimination.

II.

Under Regulations Promulgated by the National Labor Relations Board, Petitioner's Allegations of Union Discrimination Raise Substantial and Material Factual Issues Which Entitle It to an Evidentiary Hearing.

By steadfastly refusing to afford the Petitioner a hearing, the NLRB has failed to abide by its own rules. Section 102.69(d) of the Board's rules and regulations states that "if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, *he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer.*" (Emphasis supplied.) As the Fourth Circuit indicated in *NLRB v. Bata Shoe Co.*, 377 F. 2d 821, 826 (1967), there are two basic tests which must be satisfied before post-election objections will be held to raise material and substantial unresolved factual issues. First, the facts alleged by the party

requesting a hearing must, if true, be sufficient to warrant setting aside the election. Second, the party requesting the hearing must make a prima facie case that substantial and material factual issues exist which must be resolved at an evidentiary hearing. *Also see General Electric Co., Specialty Control Dept. v. NLRB*, 383 F.2d 152 (4th Cir. 1967). It is irrelevant whether the post-election allegations of union discrimination are raised by means of a motion to disqualify, as in the instant case, or by post-election objections. Both procedures serve the identical purpose of bringing questionable conduct to the NLRB's attention and the same tests should be applied.

Without question, Petitioner has met the requirements of the first test: if the Union does, in fact, discriminate on the basis of race or sex, then under *Mansion House* and *Bekins*, the Board had no constitutional power to confer a representation certificate and the attendant benefits and protections under the Act upon the Union. Therefore, the pivotal issue is whether the evidence proffered by the Petitioner in its Motion to Disqualify supports a prima facie case sufficient to warrant a hearing on the issue of union discrimination. It is significant in this respect that the court in *Mansion House* accepted mere statistical evidence as establishing that a union has been guilty of racial discrimination in the past and explicitly held the fact "that no minority applicant has been rejected by the union is not the sole test." Instead, the court looked to the standards of proof generally held to be applicable in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.*, and dismissed as a relevant factor "good intent or absence of discriminatory intent." Moreover, the Sixth Circuit Court of Appeals

in *NLRB v. Difco Laboratories, Inc.*, 389 F.2d 663 (1968), *cert. denied*, 393 U.S. 828 (1968), recognized that "there must be limits to what an objecting party can be required to offer in order to render a hearing necessary. . . ."

It is abundantly clear that an objecting party is under no obligation to present ironclad proof that a union discriminates in order to be entitled to a hearing, since the very purpose of the hearing is to provide an opportunity to ascertain whether the union in fact discriminates against members of the bargaining unit. It will often be impossible until the hearing itself to discover the facts which conclusively prove this issue. As enunciated by the Ninth Circuit Court of Appeals in an analogous case:

> "It is apparently the attitude of the Board that Alson had the burden of proving facts sufficient to require a new election in order to obtain a hearing, while the test is that Alson's burden was to present evidence sufficient to make a prima facie showing as to the alleged facts which, if true, would require a new election." *Alson Mfg. Aerospace Div. of Alson Industries, Inc.*, 523 F. 2d 470, 472 (1975).

Where an employer has no bargaining history with a particular local, as in the instant case, the only evidence which can be produced to obtain a hearing is either statistics showing disparate treatment of minorities, or proof that in the past the union has engaged in discrimination while representing employees at other companies. Rarely, however, will statistical data be other than in the sole possession of the union, and this problem is aggravated by the fact that the NLRB regulations prevent pre-hearing discovery. Virtually all of the

information to determine the nature, scope and effect of the Union's discriminatory policies and practices is under the Union's exclusive control.

There is ample evidence to support a prima facie case which would entitle Petitioner to a hearing. For instance, the constitution of the Sheet Metal Workers' International Association sets up a system of locals and imposes restrictions on transfer between locals in a manner which has received judicial condemnation. Article Twenty-Two of the constitution prevents members of a production local, such as the local here involved, from transferring to "building and construction trade local unions." Because most of the minority workers are situated in the production worker local, and virtually no minority workers are members of Local 108, the building and construction trade local of the Sheet Metal Workers in the Los Angeles area, the effect is to establish two segregated unions within the very same union. This dual local structure has been proscribed by various courts, *United States v. Sheet Metal Workers International Ass'n, Local Union No. 36, AFL-CIO*, 416 F.2d 123 (8th Cir. 1969), especially in the trucking industry. *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). In fact, this was the sort of information which the Eighth Circuit instructed the NLRB to consider the *Mansion House* case, *supra*.

A second aspect of the Petitioner's prima facie case is solid proof that the International Association and its member locals have persistently violated the equal employment opportunity laws of the state and federal governments. This fact has been documented in nu-

merous court cases. *See, e.g., United States v. Sheet Metal Workers International Ass'n, Local Union No. 36,* 416 F.2d 123 (8th Cir. 1969); *Sims v. Sheet Metal Workers International Ass'n, Local Union No. 65,* 489 F.2d 1023 (6th Cir. 1973); *United States v. Local No. 86, Ironworkers et al.,* 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd,* 443 F.2d 544 (9th Cir. 1971), *cert. denied,* 404 U.S. 984 (1971); *United States v. Sheet Metal Workers, Local 10,* 3 EPD ¶ 8068 (D.N.J. 1970); *United States v. Sheet Metal Workers, Local 10,* 6 FEP Cases 1036 (D.N.J. 1973).

In light of the complete control which the International Association exercises over the activities of affiliated local unions, there was reasonable cause to believe that Local 170 engages in similar practices. The close link between the policies of the International and its locals is evident from the language of the Sheet Metal Workers' International Association's constitution. On their face, Sections 1 and 2 of Article One establish the domination of the International over all its locals and over all "subjects pertaining to this Association." Article Ten, Section 4 requires all locals to abide by the constitution of the International and the policies set by its general officers. Section 5 thereof states that local unions are prohibited from adopting any rules, regulations or policies inconsistent with those in the International's constitution and requires local bylaws to be filed with the General Secretary-Treasurer. Any provisions which are regarded as inconsistent with the constitution will be given no effect. In addition, Article Three, Sections 2(a) and (c) confers the power upon the General President to take over local unions or to revoke their charters if they conduct their affairs "in a manner which is detrimental to

the members thereof or to the best interests of [the International]." Finally, a strong financial nexus between the International Association and local unions also exists. Under Article Ten, Section 2(b) of the constitution, all members of its local unions are required to pay a "per capita tax" of $3.75 per month and an initiation fee of at least $15.00.

In sum, while this evidence does not in itself prove that Local 170 discriminates on the basis of race or sex, it does raise a substantial and material factual issue which can be resolved only at a hearing. When the NLRB refused to grant an opportunity to present evidence on this question, it defied its own regulations. Thus, the Ninth Circuit Court of Appeals erred when it upheld the Board's order finding this fact an inadequate defense to a refusal to bargain charge.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Natter Manufacturing Corporation, Petitioner, v. National Labor Relations Board, Respondent. No. 75-3730.

United States Court of Appeals, Ninth Circuit.

Aug. 15, 1978.

Before WALLACE and SNEED, Circuit Judges, and EAST,* District Judge.

WALLACE, Circuit Judge:

Natter Manufacturing Corporation (Natter) petitions for review of the National Labor Relations Board's decision that Natter has violated its statutory duty to bargain in good faith with the certified bargaining representative of its employees. We find Natter's contentions to be unpersuasive and we therefore grant the Board's cross-application for enforcement.

I

On April 20, 1973, Local 170 of the Sheet Metal Workers' International Association (Union) petitioned the NLRB for certification as the collective bargaining representative of Natter's production and maintenance employees. On April 25, the Board's regional director notified the parties that a representation hearing would be held on May 23, 1973. Two weeks prior to the scheduled hearing, Natter filed with the Board a motion seeking permission to introduce evidence at the hearing of the Union's discriminatory practices. The Board subsequently denied the motion with the express qualification that Natter could reassert this issue following the potential representation election.

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*Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

At the representation hearing held on May 23, Natter renewed its contention that the issue of the Union's alleged discriminatory practices should be litigated prior to the election. On June 15, the regional director issued his decision directing an election and rejecting Natter's contention that it should be permitted to litigate the discrimination issue prior to the election. Natter subsequently requested the Board to review the regional director's decision. That request was denied on the ground that it "raise[d] no substantial issues warranting review."

On July 13, 1973, the election was conducted; 150 votes were cast for the Union and 151 were cast against the Union. The Union timely filed objections to the conduct of the election. The Union's primary objection was that on the day of the election, certain of Natter's officials had distributed to the voting employees a campaign flyer which contained a substantial, material misrepresentation. The flyer stated in part:

> We have been advised the National Labor Relations Board has found Local 170 guilty of five (5) unfair labor practices at Accuride. The Union was found guilty of harassment, intimidation, and coercion toward employees at Accuride.

In fact, the dispute between the Union and the employer referred to in the flyer had been resolved pursuant to a settlement agreement. By its express terms, the agreement did not constitute an admission by the Union that it had engaged in any unfair labor practice. By the same token, the agreement certainly did not constitute an adjudication that the Union had breached its statutory duties.

The Board, agreeing with the Union's claim that Natter's misrepresentation had impermissibly interfered with the fair conduct of the election, set aside the results of the election. 210 N.L.R.B. 118 (1974). Significantly, the Board's ruling was based upon its prior decision in *Dubie-Clark Co.*, 209 N.L.R.B. 217 (1974), in which the Board had set aside election results because of the union's mischaracterization of a settlement agreement as a finding that the employer had committed unfair labor practices. *Id.* at 218. In so doing, the Board explicitly condemned the misuse or mischaracterization of its documents or processes in order to secure partisan advantage.

At the Board's direction, a second election was held on May 23, 1974, which resulted in the Union receiving a majority of the votes cast. Accordingly, on May 30, Natter moved the Board to disqualify the Union from certification on the grounds that the Union engaged in race and sex-based discrimination. Natter also requested that the Board conduct a hearing on its discrimination claim.

Natter's motion and hearing request were supported primarily by citations to several cases in which various other locals of the Sheet Metal Workers' International, and the International itself, had been found guilty of unlawful discrimination, and various provisions of the International's constitution which allegedly demonstrate the International's control over its locals.

The Board's regional director denied the motion and refused to grant the hearing on the grounds that the International and its locals were legally discrete entities. Therefore, since Natter had made *no* showing of past or present discrimination on the part of Local

170, Natter had not made out a prima facie showing which would entitle it to a hearing on its claim. The regional director therefore certified the Union. Natter's subsequent request for Board review of the regional director's decision was denied.

Following culmination of the representation proceedings, Natter has steadfastly refused to bargain with the Union. As a result, the Union brought unfair labor practice charges, claiming that Natter's refusal to bargain constitutes a violation of section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). In resistance to the section 8(a)(5) charge, Natter reasserted its claims that the Union engaged in discriminatory practices and that the Board had erred in setting aside the results of the first election.[1]

On the General Counsel's motion for summary judgment, the Board rejected Natter's contentions and ruled that Natter had violated its duty to bargain in good faith with its employees' certified representative. 221 N.L.R.B. 13 (1975). The basis of the rejection was that the issues had been previously litigated in the underlying representation case, and that in the absence of newly discovered or previously unavailable evidence, Natter could not relitigate these issues in the present unfair labor practice case. *See* 29 C.F.R. § 102.67(f);

[1]We recently reiterated the rule that a party must reassert its objections pertaining to a representation proceeding in a related unfair labor practice proceeding in order to preserve those objections for review by this court. *NLRB v. Children's Baptist Home*, 576 F.2d 256, at 261-262 (9th Cir., filed June 9, 1978). Thus, since Natter properly followed this procedure, we may review its objections regarding the underlying representation case in determining whether to enforce the Board's order in the subsequent unfair labor practice case. *See AFL v. NLRB*, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed.2d 347 (1940).

see also NLRB v. Children's Baptist Home, 576 F.2d 256, at 261 n.4 (9th Cir., filed June 9, 1978).

Natter's petition for review raises its contentions that the Board erred in (1) setting aside the results of the first election, and (2) denying Natter a hearing on its allegation that the Union practiced invidious discrimination. We disagree.

II

In *Hollywood Ceramics*, 140 N.L.R.B. 221 (1962), the Board explained its policy of setting aside election results when a party's pre-election "misrepresentation, whether deliberate or not, may reasonably by expected to have a significant impact on the election." *Id.* at 224. While the case before us was pending on appeal, however, the Board issued its decision in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. No. 190 (1977) in which the Board overruled *Hollywood Ceramics* and announced that it would "no longer set elections aside on the basis of misleading campaign statements." *Id.*, slip op. at 9. Although Natter correctly points out that the Board is applying *Shopping Kart* retroactively, *see Shalom Nursing Home*, 230 N.L.R.B. No. 145 (1977), it is clear that *Shopping Kart* does not control here.

In *Shopping Kart*, the Board carefully explained that it would continue to set aside election results "in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes. . . ." 228 N.L.R.B. No. 190, slip op. at 9. In subsequent cases, the Board has carefully preserved this distinction between general campaign misstatements, and misrepresentations pertain-

ing to the Board, its documents, and processes. *See Formco, Inc.*, 233 N.L.R.B. No. 5 (1977), and *Shalom Nursing Home, supra*, 230 N.L.R.B. No. 145.

In *Formco*, the Board considered the consequences of a union's pre-election statement that the employer had been found guilty of unfair labor practices when in fact the employer had signed a settlement agreement containing a nonadmission clause. In setting aside the election, the Board again instructed that "*Shopping Kart* did not change Board law with regard to improper use of the Board and its processes for election campaign purposes." 233 N.L.R.B. No. 5, slip op. at 3. Therefore, as *Formco* explains, the Board's decision in *Shopping Kart* in no way undermined the vitality of its decision in *Dubie-Clark*.

[1] Of course, the misrepresentations condemned in *Formco* and *Dubie-Clark* are essentially identical to the one in question in the case before us. The only remaining question, therefore, is whether, as Natter argues, the Board's differentiation between general election propaganda and misrepresentations pertaining to the Board and its processes is so irrational as to constitute an abuse of discretion. We believe the Board's rule relating to campaign statements which misrepresent the Board's processes is within the Board's "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 328, 91 L.Ed. 322 (1946); *accord, NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767, 89 S.Ct. 1429, 22 L.Ed.2d 709 (1969); *Hecla Mining Co. v. NLRB*, 564 F.2d 309, 313 (9th Cir. 1977); *NLRB*

v. W. S. Hatch Co., 474 F.2d 558, 560-61 (9th Cir. 1973); *cf. Linden Lumber Div. v. NLRB*, 419 U.S. 301, 310, 95 S.Ct. 429, 42 L.Ed.2d 465 (1974) (Board's rule that union must seek election where employer refuses to recognize majority status on the basis of authorization cards upheld as not "arbitrary and capricious or an abuse of discretion"). We agree with the Board that it has a paramount interest in maintaining an apparent, as well as actual, even-handed role in the process of orderly labor relations. The Board's rule, designed to prevent the misuse of its decisions, orders, documents, and other processes to obtain an election advantage, is a permissible method of enhancing that vital interest. *See NLRB v. Clarytona Manor, Inc.*, 479 F.2d 976, 980 (7th Cir. 1973).

III

Natter's final claim is that the Board erred in refusing to conduct a hearing on its allegation that the Union engages in unlawful discriminatory practices.

[2] As we have consistently explained, in order to obtain a hearing on an election objection, "the objecting party must supply prima facie evidence, presenting 'substantial and material factual issues' which would warrant setting aside the election." *NLRB v. L. D. McFarland Co.*, 572 F.2d 256, 261 (9th Cir. 1978), *quoting Alson Mfg. Aero. Div. of Alson Indus., Inc. v. NLRB*, 523 F.2d 470, 472 (9th Cir. 1975); *accord, NLRB v. Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1133 (9th Cir. 1973); *NLRB v. Singleton Packing Corp.*, 418 F.2d 275, 280 (5th Cir. 1969), *cert. denied*, 400 U.S. 824, 91 S.Ct. 47, 27 L.Ed.2d 53 (1970); *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 825-26 (4th Cir. 1967); see also 29 C.F.R. § 102.69

(d). Thus, if the objector fails to proffer specific evidence which would constitute a prima facie showing of its contentions, or if those contentions, even if true, would not warrant setting aside the election, then the Board need not grant an administrative hearing.[2]

[3] We fully agree with the conclusion of the Board that Natter has presented no *facts* which would establish a prima facie case that this particular union is guilty of racial discrimination. Natter's reference to decisions involving the Sheet Metal Workers' International and other affiliated locals does not carry its burden. Absent a showing that Local 170 was virtually dominated by the International or a tainted local, the allegations concerning the other organizations are little, if any, evidence that Local 170 engages in discriminatory practices.[3] *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436, 447 (5th Cir. 1975), *cert. denied*, 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976); *see also NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 929 n.21 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092, 97 S.Ct. 1105, 51 L.Ed.2d 538 (1977). Thus, having failed to make out a prima facie showing, Natter was not entitled to a hearing.[4]

ENFORCED.

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[2]During the administrative proceedings, the Board was following a policy of denying certification to labor unions which engaged in racial discrimination. The Board believed this policy to be compelled by the U.S. Constitution. *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974). While this case was pending on appeal, the Board overruled *Bekins* and concluded that it would no longer deny certification on these grounds, but rather would resolve allegations of union discrimination during appropriate unfair labor practice proceedings. *Handy Andy, Inc.*, 228 N.L.R.B. No. 59 (1977). The correctness of the Board's *Handy Andy* rule remains an open question; at least one court of appeals has held that the constitution prohibits the Board from certifying discriminatory unions. *See NLRB v. Mansion House Center Management Corp.*, 473 F.2d 471 (8th Cir. 1973).

Under the facts of this case, however, we need not determine the correctness or the retroactivity of *Handy Andy*. *Handy Andy* neither affects the union's duty of fair representation nor obviates the Board's policy of permitting the employer to request a hearing on this issue. *Handy Andy* merely prevents the employer from raising this issue in the representation case and requires it to do so, if at all, in the subsequent unfair labor practice proceedings. Since Natter raised the discrimination issue in the unfair labor practice case, *Handy Andy* does not affect our analysis of the correctness of the Board's refusal to hold a hearing on this issue.

[3]Natter draws our attention to various provisions in the Sheet Metal Workers' constitution in order to establish this domination. We find nothing in these provisions, however, which would warrant a conclusion that if the International discriminates on the basis of race, then Local 170 does too. In other words, these rather standard provisions coupled with evidence of past unlawful conduct by the International do not provide specific evidence of current unlawful conduct by Local 170.

[4]Natter argues that without a hearing and the concomitant opportunity to subpoena and examine witnesses, it has no effective method of acquiring the evidence the Board demands. This argument altogether misses the point. If in fact Natter's contentions are true, we see no reason why it could not have substantiated those allegations with affidavits of persons who have witnessed or suffered the discrimination. *See, e.g., Alson Mfg. Aero. Div. of Alson Indus., Inc. v. N.L.R.B.*, 523 F.2d 470 (9th Cir. 1975). But in any event, the essence of Natter's argument is that it should be entitled to a fishing expedition in order to prove its wholly unsubstantiated assertions that *this particular* local practices invidious discrimination. This, of course, is completely foreclosed by our prior cases cited in the text.

We point out, however, that our enforcement of the Board's order does not necessarily close forever the issue of whether the Union unlawfully discriminates. We recently explained that there are some circumstances which, although not justifying an employer's refusal to bargain, do provide a basis for an employer seeking remedial aid from the Board, including a revocation of the Union's certification. *NLRB v. Lee Office Equip.*, 572 F.2d 704, 707 (9th Cir. 1978). We leave for another day the question of whether an employer can successfully base such a motion on proof of the Union's unlawful discriminatory practices. *See generally Leslie, Governmental Action and Standing: NLRB Certification of Discriminatory Union*, 1974 Ariz.St.L.J. 35.

APPENDIX B.

Natter Manufacturing Corporation and Sheet Metal Workers' International Association, Local Union 170, AFL-CIO, Petitioner. Case 21-RC-13198.

April 17, 1974

DECISION ON REVIEW, ORDER, AND DIRECTION OF SECOND ELECTION

By Chairman Miller and Members Jenkins and Kennedy

On August 28, 1973, the Regional Director for Region 21 issued a Supplemental Decision and Certification of Results of Election in the above-entitled proceeding, in which he overruled the Petitioner's objections to the election hereinbefore conducted on July 13, 1973, and certified the results thereof.[1] Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, as amended, the Petitioner filed a timely request for review of the Regional Director's Supplemental Decision on the grounds, *inter alia,* that in overruling Objection 2 he erred in finding that the Employer's leaflet distributed to employees on the day of the election did not contain a material misrepresentation affecting the election results.

By telegraphic order dated October 25, 1973, the request for review was granted as to Objection 2 and denied in all other respects. Thereafter, the Employer filed a brief on review.

[1]The tally of ballots for the election showed that of approximately 325 eligible voters, 301 cast valid ballots, of which 150 were for, and 151 against, the Petitioner. There were no challenged ballots.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review, including the Employer's brief on review, and makes the following findings:

Objection 2 alleged that the Employer made material and substantial misrepresentations of fact in a leaflet which it distributed to employees at their work places less than 24 hours before the election. The leaflet,[2] bearing the advice, in large capitalized letters, "confidential, for supervisors," contained the following message:

> We have been advised that the National Labor Relations Board has found Local 170 guilty of five (5) unfair labor practices at Accuride. The Union was found guilty of harassment, intimidation, and coercion toward employees at Accuride. You can give this information to your employees. The decision was reached today: July 12, 1973.

The subject matter of the leaflet concerns an unfair labor practice case which arose out of the Petitioner's involvement in a labor dispute at another company in the Los Angeles area known as Accuride. Contrary to the statement in the leaflet that the Board had found the Petitioner guilty of unfair labor practices, the facts are that the Petitioner had signed an informal settlement agreement with respect to charges of unfair labor practices filed against it and the agreement contained a nonadmission clause.

[2]The leaflet was printed in English and in Spanish, because there were many Spanish-speaking employees in the unit.

The Regional Director concluded that the leaflet did not contain such a "substantial departure" from the truth so as to warrant setting the election aside, that the subject of the leaflet was not within the special knowledge of the Employer, and that, in the absence of special knowledge, misrepresentations are likely to have less impact inasmuch as the employees are more capable of evaluating the accuracy and significance of the material. The Employer, in its brief on review, supports the Regional Director's conclusions, arguing further that, as the leaflet clearly refers to the National Labor Relations Board, it would have been easy for employees to check with that Agency concerning the actual facts.

In *Dubie-Clark Co., Incorporated*, 209 NLRB No. 21, just issued, the Board found objectionable a similar mischaracterization of a Board-approved informal settlement agreement containing a nonadmission clause. In that case, the petitioning labor organization made a misrepresentation about the employer's involvement in an unfair labor practice case 3 days before the election and referred employees to the notice which the employer had been required to post in the plant. Here, the misrepresentation was made on the day of the election and the employees, even if they were disposed to check into the accuracy of the statement contained in the leaflet, had very little time to do so.

Accordingly, Objection 2 is hereby sustained, and we shall set side the election and direct that a new one be conducted.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX C.

Natter Manufacturing Corporation *and* Sheet Metal Workers' International Association, Local Union No. 170, AFL-CIO. Case 21-CA-13113

October 23, 1975

DECISION AND ORDER

By Members Fanning, Jenkins, and Penello

Upon a charge filed on October 28, 1974, by Sheet Metal Workers International Association, Local No. 170, AFL-CIO, herein called the Union, and duly served on Natter Manufacturing Corporation, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint on November 22, 1974, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 9, 1974, following a Board election in Case 21-RC-13198 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing

[1]Official notice is taken of the record in the representation proceeding, Case 21-RC-13198, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regula-

(This footnote is continued on next page)

on or about October 16, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 3, 1974, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint and asserting an affirmative defense.

On December 20, 1974, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 2, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Notice To Show Cause, Respondent admits all of the substantive averments of the complaint but asserts as an affirmative defense the ineligiblity of

tions, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

the Union for representative status because of its policy and practice of discrimination on the basis of race, sex, religion, and national origin. Further, Respondent claims in paragraph 2 that Respondent's supervisors solicited and coerced its employees to support the Union. Finally, in paragraph 3, Respondent claims that the results of an election held on July 13, 1973, in which a majority of Respondent's employees voted against representation, should be certified by the Board. The General Counsel asserts that Respondent's claim that the Union is not a labor organization within the meaning of Section 2(5) of the Act was duly considered by the Decision and Direction of Election; the Union's alleged discriminatory practices were duly considered in both the Decision and Direction of Election and the Second Supplemental Decision and Certification of Representative; and both defenses were duly considered by the Board. As to the other affirmative defenses set forth in Respondent's answer, Respondent makes no claim that such alleged defenses are in fact newly discovered or based on previously unavailable evidence. Therefore, General Counsel contends that there exists no issue which would warrant a hearing before the Board. We agree with the General Counsel.

Our review of the record herein, including the record in Case 21-RC-13198, discloses that, after a hearing, the Regional Director directed an election on July 13, 1973, which resulted in a vote of 151 to 150 against the Union. Petitioner filed objections which alleged that (1) the Employer violated the *Peerless Plywood* rule[2] by making a distribution of election propaganda to employees in the plant on the morning

[2] *Peerless Plywood Company*, 107 NLRB 427 (1953).

of the election which took place less than 24 hours prior to the conduct of the election; (2) the distribution conducted by the Employer, as described above, interfered with the election because the matter distributed-contained substantial misrepresentations of material facts likely to induce reliance on the part of the employees in casting their votes, and were made at a time when the Petitioner had no effective opportunity to reply; (3) the eligibility list submitted by the Employer failed to comply with the *Excelsior Underwear*[3] requirements inasmuch as the list contained the names of the three employees who were not eligible to vote because they were not employed in the bargaining unit; (4) the Employer, on the day of the election, went to individual employees and urged them to vote against the Union; (5) the Employer made an offer of free transportation to the polls to Margarita Yriboyen, which offer was conditioned upon her voting against the Petitioner; and (6) on the day preceding the day of the election, an employer representative, Mandrupt, harassed and interrogated employee Juan Arizaga. After investigation, the Regional Director, on August 28, 1973, issued a Supplemental Decision and Certification of Results of the Election, in which he found that the objections raised no substantial or material issues as to the election or its results, overruled the objections in their entirety, and certified the results of the election.

On September 7, 1973, Petitioner filed a request for review of the Supplemental Decision and Certification of Results of Election.

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[3]*Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

On April 17, 1974, the Board issued a Decision on Review, Order, and Direction of Second Election (210 NLRB 118 (1974)). Pursuant thereto, the Regional Director directed a second election, conducted on May 23, 1974, which resulted in a vote of 203 to 198 in favor of the Union and there were 3 challenged ballots. On May 30, 1974, in accordance with instructions received from the Board on May 14, 1973,[4] the Employer filed a motion to disqualify the Petitioner.

On May 31, 1974, Respondent filed timely objections which alleged that (1) union representatives visited the homes of employees and told them that the work force at certain of the Employer's operations would become wholly Mexican-American; (2) union supporters told other employees that they would lose their jobs if they voted against the Union; and (3) union representatives told employees that the Union would post a bail bond for any employees voting "yes" if they were arrested by officials from the Immigration and Naturalization Services. After reasonable notice to the parties to present relevant evidence, the Regional

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[4]The instructions from the Board read as follows:

> Having duly considered Employer's Motion that evidence of alleged discriminatory character and practices of Petitioner be admitted at the hearing now scheduled for May 23, 1973, the Board is of the opinion that it would not effectuate the policies of the Act to permit litigation of the issues raised by said Motion at the preelection hearing. Accordingly, said Motion is hereby denied without prejudice to the Employer's right to raise the issue of disqualification of the Petitioner by Motion filed with the Regional Director within five days of the issuance of the tally of ballots for an election which may be conducted herein. Said motion if filed shall be processed in essentially the same manner as objections filed in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations.

By direction of the Board.

Director completed an investigation of the motion to disqualify Petitioner and of the objections and issued on August 9, 1974, a Second Supplemental Decision and Certification of Representative in which he found that the Employer failed to provide any probative evidence which would establish a *prima facie* case that Petitioner has engaged in racial or other forms of invidious discrimination, and denied Employer's motion to disqualify Petitioner from receiving a National Labor Relations Board certification and denied Employer's request for a hearing. He also overruled the objections in their entirety and certified the Union.

On August 16, 1974, Respondent filed a request for review and a supporting brief in which it substantially reiterated the matters raised in its motion to disqualify Petitioner. In a telegraphic communication of October 2, 1974, the Board denied Employer's request for review as it raises no substantial issues warranting review or hearing.

In its response to the Notice To Show Cause, the Respondent reiterates its representation case contention that a hearing is required to determine the issue of whether the Union is engaging in unlawful race and sex discrimination, citing the decision in *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB 138 (1974). This contention assumes, however, that the Respondent raised, in the representation case, the existence of a substantial and material question of fact concerning this issue. Not having presented facts in the representation case to support its allegations there, a hearing is not required. Accordingly, we find no merit in this contention.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised to the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.[6]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

1. THE BUSINESS OF THE RESPONDENT

Respondent, a corporation, has been engaged in the manufacture and sale of fabricated metal products at its facilities located in Temple City, Arcadia, and La-Verne, California. Respondent, in the course and conduct of its business operations, annually sells and ships goods valued in excess of $50,000 directly to customers located outside the State of California.

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[5]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67 (f) and 102.69(c).

[6]Member Penello, having agreed to the certification of the Union herein for the reasons set forth in the dissenting opinion in *Bekins Moving Storage Co. of Florida, Inc.*, 211 NLRB 138 (1974), concurs in the result herein.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Sheet Metal Workers' International Association, Local Union No. 170, ALF-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including shipping and receiving employees, truck drivers, and leadmen employed by Respondent at its facilities located at 5511 North Peck Road, Arcadia, California; 9440 Gidley Street, Temple City, California; 9620 Gidley Street, Temple City, California; and 900 Palomares Street, LaVerne, California, but excluding all office clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act.

2. The certification

On May 23, 1974, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 21, designated the Union as their

representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 9, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 7, 1974, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 16, 1974, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since October 16, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and com-

merce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Natter Manufacturing Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers' International Association, Local Union No. 170, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including shipping and receiving employees, truck drivers, and leadmen employed by Respondent at its facilities located at 5511 North Peck Road, Arcadia, California; 9440 Gidley Street, Temple City, California; 9620 Gidley Street, Temple City, California; 900 Palomares Street, LaVerne, California, but excluding all office clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 9, 1974, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 16, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Natter Manufacturing Corporation, Arcadia, Temple City, and LaVerne, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Sheet Metal Workers' International Association, Local Union No. 170, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, including shipping and receiving employees, truck drivers, and leadmen employed by Respondent at its facilities located at 5511 North Peck Road, Arcadia, California; 9440 Gidley Street, Temple City, California; 9620 Gidley Street, Temple City, California; and 900 Palomares Street, LaVerne, California, but excluding all office clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and places of business in Arcadia, Temple City, and LaVerne, California, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

---

[7]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Sheet Metal Workers' International Association, Local Union No. 170, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including shipping and receiving employees, truck drivers, and leadmen employed by Respondent at its facilities located at 5511 North Peck Road, Arcadia, California; 9440 Gidley Street, Temple City, California; 9620 Gidley Street, Temple City, California; and 900 Palomares Street, LaVerne, California, but excluding all office clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act.

NATTER MANUFACTURING
CORPORATION

APPENDIX D.

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:
29 U.S.C. §§ 158(a)(1), (5):

> "Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Supreme Court, U. S.
FILED
JAN 8 1979
MICHAEL RODAK, JR., CLERK

No. 78-778

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATTER MANUFACTURING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 580 F. 2d 948. The decision and order of the National Labor Relations Board (Pet. App. 13-26) are reported at 221 N.L.R.B. 13 (1975).

JURISDICTION

The judgment of the court of appeals was issued on September 27, 1978. The petition for a writ of certiorari was filed on November 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner failed to present sufficient evidence of race or sex discrimination by a union to entitle it to an evidentiary hearing on its

objection to the certification of the union as the representative of petitioner's employees.

STATEMENT

1. Petitioner manufactures and sells fabricated metal products. Local 170 of the Sheet Metal Workers' International Association won a Board-conducted representation election among petitioner's production and maintenance employees. Petitioner then filed a motion with the Regional Director to disqualify Local 170 from certification as the employees' bargaining representative on the ground that it "has traditionally and is presently engaged in practices which discriminate on the basis of race, sex, religion and national origin" (R. 178-179).[1] Petitioner requested a hearing on its allegation (R. 178).

In support of its claim, petitioner cited "a number of court cases wherein different local unions associated with the International, as well as the International itself, have been found guilty of unlawful racial discrimination" (R. 206). It also asserted that between 1967 and 1971 less than 1% of those referred to construction jobs in California by various Sheet Metal Workers local unions were black.[2] Petitioner added that "this record of discrimination on the part of the local unions is a direct result of the control that the Sheet Metal Workers International Association has over local unions" citing various provisions of the International constitution (R. 206).

2. The Regional Director denied petitioner's motion and certified Local 170 as the bargaining representative of the unit employees (R. 205-211). Rejecting petitioner's

[1]"R." refers to the bound volume of the record materials filed with the court of appeals.

[2]These figures did not include Local 170, which is a "production" local, not a "construction" local.

assertion that discriminatory behavior by other locals or the International was evidence of the same conduct by Local 170, the Regional Director stated (R. 207-208):

> a local union is a legal entity apart from its International and not merely an arm of the latter. To attribute the alleged unlawful conduct of other local unions associated with the International to the Union will be tantamount to subscribing to the concept of guilt by association. Even the assertion that the International dominates the Union to the extent of making the Union an appendage of the International has no basis. The provision of the International Constitution places restraints upon the activities of the Union, but does not deny its separate existence nor make it an administrative arm of the International. [Citation omitted.]

The Regional Director also denied petitioner's request for a hearing. He explained that under Section 102.69 of the Board's Rules and Regulations, 29 C.F.R. 102.69, "the objecting party must supply specific evidence which *prima facie* would warrant setting the election aside," and "a hearing is not a matter of right unless substantial and material issues are raised." He concluded that here petitioner had "failed to provide any probative evidence which would establish a *prima facie* case that the Union has engaged in racial or other forms of invidious discrimination" (R. 209).

The Board denied petitioner's request for review of the Regional Director's decision (R. 263). In the ensuing unfair labor practice proceeding, petitioner renewed its objection that the union's alleged discriminatory policies should have precluded its certification. The Board again rejected this contention and found that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the union (Pet. App. 22).

3. The court of appeals enforced the Board's bargaining order (Pet. App. 1-9). Rejecting petitioner's contention that it was entitled to an evidentiary hearing, the court noted that, in order to obtain a hearing on an objection to an election, "the objecting party must make a *prima facie* showing, presenting 'substantial and material factual issues' that would warrant setting aside an election" (Pet. App. 7). In this case, the court concluded, petitioner "has presented no *facts* which would establish a *prima facie* case that this particular union is guilty racial discrimination" (*id.* at 8; emphasis in original). Petitioner's references to decisions involving the Sheet Metal Workers' International Association and other affiliated locals was not enough to carry its burden, the court held, absent some showing that Local 170 was dominated by the International or by another local that engaged in discrimination (*ibid.*).

ARGUMENT

1. Petitioner first contends that the Board may not constitutionally certify a union that discriminates unlawfully on the basis of race or sex (Pet. 7-14). That question, however, is not presented in this case, because, under the Board procedures applicable at the time of this proceeding, the Board would not have certified the union if petitioner had established that the union in fact engaged in race or sex discrimination.[3] Under established principles, which petitioner does not challenge (see Pet. 14-15), a hearing on post-election objections is available only if the objecting party makes a *prima facie* showing of

[3]In *Bekins Moving & Storage Co. of Florida, Inc.*, 211 N.L.R.B. 138 (1974), the Board, relying on constitutional principles and the decision in *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973), announced that "if properly substantiated objections to the issuance of a certification are filed," it would not "confer the benefits of a certification upon a labor organization which is shown to be engaging

substantial and material factual issues which, if resolved in the objecting party's favor, would warrant setting aside the election. Applying that well-settled rule here, the Board, upheld by the court of appeals, concluded that petitioner failed to make a *prima facie* showing that Local 170 had engaged in discriminatory practices.

Thus, the only issue presented in this case is whether the Board was correct in determining that petitioner's factual showing fell short. That factual question does not warrant review by this Court. In any event, there is no merit to petitioner's contention (Pet. 15-19) that it made the requisite *prima facie* showing.

Petitioner presented no evidence that Local 170 engages in discrimination. It produced no affidavits from employees at other plants represented by Local 170 or from its own employees describing incidents of racial or other discrimination involving Local 170. Rather, petitioner claims that a *prima facie* case of discrimination by a local union is established where other locals of the same union and the national union previously have been found to have engaged in discriminatory practices.

The petitioner cites no authority to support this proposition. Indeed, the only directly applicable precedent is to the contrary. In *National Labor Relations Board* v. *Bancroft Mfg. Co.*, 516 F. 2d 436 (5th Cir. 1975), cert. denied, 424 U.S. 914 (1976), the court upheld the Board's refusal to enforce an employer's subpoena *duces tecum* for records relating to the numbers of whites and

in a pattern and practice of invidious discrimination * * * such as excluding persons from membership on the basis of race, alienage, or national origin [,] * * * [or] which is shown to have a propensity to fail fairly to represent employees." *Id.* at 138-139, 141. Since this decision was controlling at the time of the instant proceeding, there is no occassion to determine the validity of the Board's subsequent ruling in *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977), that it would no longer entertain allegations of union discrimination in representation proceedings, but would defer such contentions to unfair labor practice or revocation of certification proceedings.

blacks in the national union, where the employer's allegations of discrimination were supported only by evidence of discrimination by other locals. The court stated (516 F. 2d at 447):

> We have seen that *Mansion House* and *Bekins* [note 3, *supra*] were concerned primarily with discriminatory membership and representation policies at the local level, hence, it would be logical to assume that the Company would have come forward with at least some evidence or allegation that this particular local engages in such practices. The Company did not do so; rather, it sought to tie the membership practices of an industrial local in Mississippi to those of construction locals in Illinois.

Similarly, in this case petitioner's unsubstantiated allegation that only 1% of the construction workers referred in California by Sheet Metal Workers locals in preceding years were black was irrelevant, since Local 170 is a production local, having nothing to do with dispatching workers to construction jobs[4] (R. 206-207). *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973), on which petitioner relies (Pet. 17), does not support its position. The court remanded that case to the Board for a further hearing because the hearing examiner had excluded statistical evidence bearing on the discriminatory practices of the local union that was seeking certification. As noted above, no such offer of proof regarding the practices of Local 170 was made here.

---

[4]Petitioner's assertion (Pet. 17) that the Sheet Metal Workers International constitution precludes members of "production" locals from transferring to "construction" locals is erroneous. The constitution (Article Twenty-two, Section 10(b)) permits production local workers to transfer to a building and construction trades local union if they can demonstrate that they can perform the work done by that local. Moreover, petitioner presented no evidence that Local 170 or any other local engages in invidious discrimination against persons seeking such transfers.

Finally, there is no merit in petitioner's contention (Pet. 18-19) that the control exercised by the International over affiliated locals justifies the inference that if the former has been found to engage in discriminatory practices the latter has likely done so as well. Petitioner cites no instance in which the International required an affiliated local to adhere to a discriminatory policy. The provisions of the International constitution that require local unions to abide by the provisions of the constitution (Pet. 18) do not help petitioner, since the constitution does not in any way require or condone race or sex discrimination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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